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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 868

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL.,

Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE BALTIMORE AND OHIO RAILROAD COMPANY, ET AL.

No. 886

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE PUBLIC SERVICE COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.,

Appellants,

vs.

STATE OF OHIO, PUBLIC UTILITIES COMMISSION OF OHIO, THE WHEELING AND LAKE ERIE RAILWAY COMPANY, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF FOR RAILROAD INTERVENERS.

Summary Statement of Case.

For many years prior to August 1, 1932, there had been in effect a finely balanced and adjusted schedule of interstate and intrastate rates on bituminous coal from west-

ern Pennsylvania, northern West Virginia and certain Ohio, *e. g.*, Ohio No. 8 coal mining districts, to northern Ohio destinations, with fixed differentials which were regarded as essentially reasonable, in view of the numerous elements which have to be considered in rate making. The rate structure referred to was very fully and carefully considered in *Ohio-Michigan Coal Cases;* 80 I. C. C. 663, decided June 8, 1923, and the adjustments, including fixed differentials, and the schedules thereupon made effective continued in force and governed the highly competitive conditions prevailing in the mine fields to destinations indicated until August 1, 1932. On that date the Ohio Public Utilities Commission, by a series of mandatory and permissive orders, entered on its records, reduced certain of the intrastate rates effective within the State of Ohio, from local mines to northern Ohio destinations thereby throwing the combined interstate and intrastate rate structure above referred to and previously existing, out of balance, creating a competitive advantage in favor of the Ohio, and against the Pennsylvania and West Virginia mine operators, and discriminating against shippers in interstate commerce who were in active competition for business at the several destinations.

Following such reduction orders, which lowered the then existing rates from 4 to 29 cents per ton, the principal carriers by steam railroad, operating within Ohio and western Pennsylvania, all engaged both in interstate and intrastate commerce, petitioned the Interstate Commerce Commission for relief from the Ohio reduced rates, alleging that they constituted and effected violation of Section 13 of the Interstate Commerce Act (C. 91, Sec. 416, 41 Stat. 484; Sec. 13(3) and (4), Title 49, U. S. C. A.).

Hearings were had, voluminous testimony was taken and much argument was heard. On submission, the Commis-

sion summarized the rate and competitive situation in pertinent part as follows (R. pp. 61-63):*

> "The rate adjustment in the territory under consideration is the result of carrier and commercial competition over a long period of years together with the demands of consumers for particular grades of coal, and in some instances decisions of this Commission. Mining properties outside the State of Ohio have been located and developed with heavy investments in facilities under the rate relationships existing prior to the reductions in the State of Ohio, and these properties are now being financially and physically seriously affected. One of the complainants has become bankrupt since the filing of its complaint, and others are on the verge of disaster. The use of substitute fuels adds to the coal producer's difficulty while substituted modes of transportation are reducing the revenues of the railroads. Not only is the truck being used to effect the railroads' revenues adversely but the barge lines in the very territory here under consideration are displacing much railroad tonnage by use of the waterways. The volume of coal trucked for short distances in the mining districts of Ohio is shown in a few instances. Apparently this form of competition is increasing as good roads are being built. Petitioners in the present proceeding do not contend that the competition of trucks is so great as to justify the reduced rail rates in Ohio. The record fully establishes that coal has moved freely between Ohio points prior to the reduction in rates in northeastern Ohio. This is significant. We are asked to prescribe reasonable rates from the Pittsburgh and certain other groups to northeastern Ohio as well as to remove undue prejudice against interstate coal producers and unjust discrimination against interstate commerce. Under the circumstances here presented such rates

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*All references are to printed record unless otherwise stated.

should be determined with great regard for the value of the service to the shipper and the existing competitive conditions. Distance has never been made the sole measure of these rates. If such a measure were to govern the farther distant groups would be unable to compete and the present relationships would be disrupted. These relationships, in general, have been in existence for many years, and counsel assert, even before this Commission was organized.

"Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding. While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago.

* * * * * * *

"Petitioning respondents submit that if the Ohio reductions remain in effect it will be necessary to resort to reductions from interstate districts to maintain the long established relationships. The record fully establishes that the Ohio reductions constitute a real discrimination against and obstruction to interstate commerce, and this is especially true under the present economic condition as lower grade coal for domestic and steam purposes than previously was obtained from interstate districts is being obtained from the Ohio districts since the reductions in rates in Ohio."

and found that (R. pp. 63-65):

"The record definitely establishes that coal from Pennsylvania, West Virginia, and Ohio mines is highly competitive at Cleveland and other destinations in northeastern Ohio to which the assailed rates apply and that there is a substantial movement of the coal from those points to such destinations. It further appears that the movement of such coal from the Ohio points or groups and to the Ohio territory outlined in appendix D is at intrastate rates which are generally

substantially lower, distance considered, than are the reasonable interstate rates, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this disparity in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other; that the Ohio intrastate traffic under these assailed rates is not contributing its just proportion to the revenues of the carriers, and by reason of that fact respondents are suffering substantial losses in their revenues to which they are justly entitled.

"We find that the rates assailed from the Pittsburgh, Freeport, Connellsville, and Fairmont districts to destinations in northeastern Ohio are reasonable, except that the measure of the rates from points on the Monongahela Railway in northern West Virginia, and their relation to the rates from the Pittsburgh and Connellsville districts will be reserved for further consideration.

"We further find that the intrastate rates here in issue from eastern Ohio districts to the destinations in northeastern Ohio as defined in this report, are and for the future will be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers of bituminous coal from the rate districts as hereinbefore defined in Pennsylvania and West Virginia to the same destinations in Ohio.

"We further find that from the points or groups and to the territory outlined in appendix D to this report the assailed Ohio intrastate rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the act.

"Such undue preference and prejudice and unjust discrimination should be removed by the establishment and maintenance of intrastate rates from the points or groups and to the destination territory from and to

which the assailed intrastate rates apply which are no lower than the specific rates or rates on the basis set forth in appendix D."

On May 2, 1933, pursuant to its report and findings summarized as above, the Commission entered its order (R. p. 77) requiring "all common carriers by railroad operating in the State of Ohio" • • • "according as they participate in the transportation" to restore the rates which had been in effect prior to August 1, 1932.

On May 22, 1933, the State of Ohio and Public Utilities Commission of Ohio, and The Wheeling and Lake Erie Railway Company, invoking provisions of Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 209, 219, filed their separate bills of complaint in the United States District Court for the Southern District of Ohio, Eastern Division, to set aside and annul said order of May 2, 1933, of the Interstate Commerce Commission and prayed issuance of interlocutory injunctions to restrain the United States and the Commission from attempting to enforce said order pending final decree.

In such bills, as provided by law, the United States of America and Interstate Commerce Commission were named as parties defendant. Numerous interested carriers and shippers were subsequently, on motions of intervention, likewise made parties defendant and the Eastern Ohio Coal Operators' Association, and others, were permitted to intervene as parties plaintiff.

The cases came on for hearing upon said bills of complaint, including the report, findings of and testimony and exhibits before the Interstate Commerce Commission, and the answers of defendants thereto, and were heard by three judges, and with consent of all parties, on June 3rd, 1933, were submitted as on final hearing for final decree.

At the instance of the District Court itself the effective date of the Commission's said order of May 2, 1933, was

postponed until July 10, 1933, but prior to said date, to-wit, on July 7, 1933, the District Court entered its own order restraining and suspending said order of May 2, 1933, of the Interstate Commerce Commission until the further order of the Court.

Owing to the suspension of the effective date of the Commission's order of May 2, 1933, from June 10 to July 10, 1933, which was brought about by the above request of the District Court, coupled with the subsequent entry of the Court's own order of July 7, the relief promised to the interested interstate carriers and shippers by said order of May 2, 1933, was withheld until January 19, 1934, while the preferences and discriminations so strikingly summarized and found by the Interstate Commerce Commission were permitted to remain for the benefit of the Ohio operators and The Wheeling and Lake Erie Railway Company and at the expense of carriers and others engaged in interstate operations.

On January 6, 1934, the District Court handed down its opinion and on January 19, 1934, the temporary injunctions or restraining orders of July 7, 1933, were vacated and set aside and the bills decreed to be dismissed for want of equity at the cost of the several petitioners (R. pp. 480, 481).

It will be noted that the order of the Commission of May 2, 1933, directing restoration of the previous rate levels governing the transportation in question was held in suspension, first, as result of the comity request made to the Commission by the District Court, to July 10, 1933, and then, by the entry on July 7, 1933 of the temporary injunction, until January 19, 1934, during all of which seven months the undue preference of persons and localities within Ohio and undue prejudice and discrimination against interstate localities and shippers and discrimination against interstate commerce was suffered to continue and

to increase at the expense of those whom the order of the Interstate Commerce Commission as entered was intended to protect.

Prior to presentation of the said decree of January 19, 1934, for signature, the plaintiffs below, namely, the State of Ohio and the Public Utilities Commission of Ohio, and The Wheeling and Lake Erie Railway Company, and others joined with them as parties plaintiff in the causes, had presented to the District Court applications with supporting affidavits asking a further stay of the Commission's said order of May 2, 1933, pending determination of their intended appeal to this Court. An answer opposing such application, likewise supported by several affidavits, was filed by the Interstate Commerce Commission (R. p. 506), and adopted by the intervening parties defendant below. Notwithstanding the opposition so presented, the lower court, while denying the motion for stay as presented, nevertheless, ordered:

> "that the operation and enforcement of the order of the Interstate Commerce Commission dated May 2nd, 1933, herein referred to, be stayed for a period not to exceed sixty days from the date hereof, for the purpose of perfecting an appeal to the Supreme Court of the United States." (R. p. 531),

and directed the defendant carriers and each of them, from and after "the expiration of sixty days from the date hereof" to "keep accurate an account in detail of all amounts received by them, by reason of the increase in the rates as authorized and required by said order of the Interstate Commerce Commission dated May 2, 1933, specifying by whom or in whose behalf such increases are paid, pending the final determination of this cause, and if upon the final determination of this cause the said order of the Interstate Commerce Commission shall be set aside or annulled, the

aforesaid carriers, and each of them, shall refund such increases, to the persons by whom, or in whose behalf, such amounts were paid, * * *"

The cross appeal, No. 886, now before this Court is directed solely to so much of said orders as decreed that the order of the Interstate Commerce Commission dated May 2, 1933, be stayed for a period not to exceed 60 days. A motion to abate said portion in each order was presented to this Court on February 7, 1934, and an February 12, following, the motion was granted and order entered and the rates required by the Commission became effective February 16, 1934, and are now in effect.

Summary of Argument.

I.

THE SOLE ISSUE BEFORE THE COURT IS WHETHER THE ORDER OF THE COMMISSION OF MAY 2, 1933, REQUIRING THE REMOVAL OF THE UNDUE PREJUDICE AS BETWEEN PERSONS AND LOCALITIES AND UNDUE, UNREASONABLE AND UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE FOUND TO EXIST IN ITS SAID REPORT, UNDER SECTION 13 (3) AND (4) OF THE ACT TO REGULATE COMMERCE, IS SUPPORTED BY PROPER FINDINGS BASED UPON SUBSTANTIAL EVIDENCE.

II.

THE ORDER OF THE COMMISSION IS VALID BECAUSE IT WAS ENTERED AFTER FULL HEARING AS REQUIRED BY LAW AND IS BASED UPON SPECIFIC FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The transcript of evidence taken before the Commission consisted of more than 3200 pages of evidence, and 421 exhibits. Many days were consumed in taking evidence. The Commission reached its conclusions after full hearing, and its findings are supported by ample evidence.

The courts confine themselves to the question whether the Commission has misinterpreted the statute under which it proceeds or has acted arbitrarily or violated constitutional rights. The power to make the order, and not its wisdom or expediency, is for the courts to review and they will not substitute their judgment for that of the Commission or review conclusions of fact or conflicts in testimony or pass upon the credibility of witnesses. *Interstate Commerce Commission* v. *U. P. R. R.*, 222 U. S. 541, 547; *Interstate Commerce Commission* v. *Illinois Central R. R.*, 215 U. S. 452, 457; *Manufacturers Railway Co.* v. *United States*, 246 U. S. 457, 483; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; *Assigned Car Cases*, 274 U. S. 564, 580; *Florida et al.* v. *United States*, decided April 2, 1934.

Section 16a of the Interstate Commerce Act (34 Stat. L., 584, U. S. Code, Title 49, Sec. 16a) authorizes the Commission after a decision, order or requirement has been made in any proceeding before it to grant a rehearing upon application by any party "if sufficient reason therefor be made to appear."

III.

THE ORDER OF THE COMMISSION IS A VALID EXERCISE OF THE AUTHORITY CONFERRED BY SECTION 13, PARAGRAPHS (3) AND (4) OF THE INTERSTATE COMMERCE ACT, BECAUSE IT REQUIRES THE REMOVAL OF UNJUST DISCRIMINATION AGAINST INTERSTATE COMMERCE.

That the Act confers authority to issue such an order was settled by this Court in *Florida* v. *United States*, 282 U. S. 194, 215, upholding the authority "to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier". Since that de-

cision this Court has sustained Section 13 orders in *Georgia Public Service Commission* v. *United States*, 283 U. S. 765; *Alabama* v. *United States*, 283 U. S. 776; *Louisiana Public Service Commission* v. *Texas & New Orleans R. R. Co.*, 284 U. S. 125; *United States* v. *State of Louisiana*, 290 U. S. 70; *State of Florida* v. *United States*, decided April 2, 1934.

IV.

THE ORDER OF THE COMMISSION IS VALID BECAUSE IT IS BASED UPON FINDINGS OF FACT AMPLY SUPPORTED BY EVIDENCE OF RECORD.

(a) The Commission found as a fact that the level of the interstate rates is reasonable.

(b) The Commission found as a fact that the Ohio intrastate rates complained of are substantially lower, distance considered, than the reasonable interstate rates approved by it.

(c) The Commission found as a fact that the disparity between Ohio intrastate rates and the interstate rates is greater than is warranted by the differences in transportation conditions.

(d) The Commission found as a fact that the intrastate traffic was not contributing its just proportion to the revenues of the carriers, thereby causing said carriers to suffer substantial losses in revenue.

(e) The Commission found as a fact that the intrastate rates were and for the future would be unduly preferential of Ohio shippers and localities and unduly prejudicial against interstate localities and shippers.

(f) The Commission found as a fact that the intrastate rates resulted and would result in undue, unreasonable,

and unjust discrimination against interstate commerce in violation of Section 13 of the Act.

ARGUMENT.

I.

The sole issue before the Court is whether the order of the Commission of May 2, 1933, requiring the removal of the undue prejudice as between persons and localities and undue, unreasonable and unjust discrimination against interstate commerce found to exist in its said report, under Section 13 (3) and (4) of the Act to Regulate Commerce, is supported by proper findings based upon substantial evidence.

The varied assignments of error, 25 in number (R. 491-496), upon analysis develop into the single one that the conclusion of the Commission upon the evidence presented was in error. Under whatever guise the contention is advanced, the purpose is manifestly to induce this Court to substitute its judgment for that of the Commission, or review conclusions of fact or conflicts in testimony or pass upon the credibility of witnesses. The function of the Court in this regard is later discussed under part II hereof.

II.

The order of the Commission is valid because it was entered after full hearing as required by law and is based upon specific findings supported by substantial evidence.

It is urged in Part I of appellant's brief (p. 9) that the order of the Commission is invalid because they were not given the "full hearing" provided for by the statute, and that the report of the Commission shows on its face that they were denied the "essence" of a full hearing. In

dealing with administrative orders of the Commission the courts have repeatedly held that such orders are void if (1) a hearing was denied; if (2) that granted was inadequate or manifestly unfair; if (3) the finding was contrary to the "indisputable character of the evidence"; or if (4) the facts found do not, as a matter of law, support the order made.

As to (1) and (2), there can be no contention here. Many weeks were consumed with the taking of testimony and over 3,200 pages of testimony and 421 exhibits were received by the Commission. Appellants were heard on direct, as well as in rebuttal of appellee's evidence. In addition, appellants asked for and were given leave to file, after the hearings closed, elaborate reply memoranda, which were made a part of the record (R. 1791, 1792, 1845). Appellants rely upon (3) and (4) for the reason that certain findings as to which there was conflicting testimony were adverse to them. Where evidence is conflicting, a finding based thereon manifestly cannot be against the "indisputable" character of the evidence if that considered was competent, and there is no contention otherwise here.

Part I of appellants' brief, therefore, merely raises questions as to the weight of the evidence and the correctness of the Commission's judgment on the facts, and indirectly seeks to have this Court substitute its judgment for that of the Interstate Commerce Commission as to the weight to be given certain evidence or upon controversial questions of fact. We perceive no difference in the argument there advanced from that under Part II, other than in the form of statement, with the exception of the serious charge and implication of "predetermination" on the part of the Commission which were not raised in the court below. And that charge, indeed, falls of its own weight upon analysis of the so-called "admission of predetermination" at page

11 of appellants' brief. Appellants distort a perfectly rational statement, which is in entire conformity with practice recognized for many years, into an "admission" that the Interstate Commerce Commission, than which no government bureau or commission in the history of this Government has a higher or cleaner record, deliberately undertook to do an unlawful thing. Under the issues, the Commission could have prescribed the same rates as those required by the State of Ohio and reduced the interstate rates in conformity therewith. Its purpose was to prescribe such lawful rates and charges as the facts might warrant, and, considering all of the evidence, it found it proper to require rates higher than those advocated by appellants.

To support the utterly unjustifiable charge of "predetermination", appellants' counsel specifically ask this Court to weigh what they call "three bodies of evidence" considered by the Commission, relating to the question of the "reasonableness" of the reduced Ohio rates, and to find that the Commission failed to give this evidence proper weight (Br. pp. 13-20).

In this connection it is hardly necessary to point out that this Court has repeatedly held that the primary question in any Thirteenth Section case is the relation of rates to each other, interstate to intrastate, or the relation of rates to income, and not the reasonableness *per se* of the intrastate rates (*Georgia Public Service Commission* v. *U. S.*, 283 U. S. 765; *Florida* v. *U. S.*, decided April 2, 1934).

But, aside from this, the statements of appellants so flagrantly ignore the evidence and the elaborate findings of the Commission with respect to each class of evidence to which they refer that it may be helpful to point out to the Court the Commission's discussion.

First, with respect to the Indiana-Illinois comparisons, which appellants' counsel say create a "strong inference

that the Ohio rates were maximum reasonable rates" the Commission said (R. 35-36):

> "It was frequently referred to in this proceeding that the reduced rates in Ohio were established on the basis of the rates prescribed for application in Illinois, *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, and from Indiana to Illinois in *Coal Trade Assn.* v. *Baltimore & Ohio R. Co.,* 185 I. C. C. 225; 190 I. C. C. 743. Elaborate comparisons were made between the Ohio reduced rates and those prescribed in Illinois territory. This evidence has had our consideration. It is generally conceded that the basis of rates on coal in the Illinois territory is the lowest in the country. This has greatly been brought about by a competitive condition differing from that in the Ohio territory, although some testimony was introduced to indicate that the actual operating conditions in Illinois are not more favorable than in Ohio. Chicago, in the Illinois territory, is the greatest coal market in this country, and, as stated in *Intrastate Rates on Bituminous Coal in Illinois, supra,* consumes annually 30,000,000 to 35,000,000 tons of coal. It was also there stated that the rate level to Chicago is the result of keen competition between producers of eastern coal, moved both by rail and water-and-rail, and producers of Illinois and Indiana coals. Like competition also exists between carriers that have their own rails extending from particular groups in Illinois and Indiana to Chicago and whose principal interest is to move coal from their own mines. The rates to Chicago have had a depressing effect upon other rates on bituminous coal in this territory and have resulted in the establishment many years ago of a competitive basis of rates that is on a very low level. These rates have been maintained, more especially to enable Illinois producers to dispose of their coal in competition with eastern coal. The volume of coal consumed at even the largest consuming point in the Ohio territory is strikingly less than consumed at Chicago. This is indicated in appendix B, although the

total tonnage to Youngstown is not there shown but heretofore set forth in the text of this report.

"The rates in the Indiana-Illinois territory have never been related to the rates in Ohio or Pennsylvania. The State of Illinois, as well as the western part of Indiana, is underlaid with a vast coal deposit from near the northern to the southern boundaries. Farther to the south is the west Kentucky field, likewise producing large quantities of coal competing in the same consuming territory where Illinois and Indiana mine operators must find their markets. Consequently, intense competition exists at every point in the State of Illinois which is a market for coal. Substantially every rate on which coal is moving in this section was established voluntarily by the carriers or by orders of the Illinois Commerce Commission or by us, and these rates have been established with primary regard for competition, and without regard for existing rates in other territories. The intense competition within the State of Illinois and Indiana has been the subject considered in numerous cases before us. Coal is not moved from the Indiana-Illinois territory to northeastern Ohio. The conditions that led us to establish the basis of rates in the Indiana-Illinois territory are not present in northeastern Ohio.

"Highly competitive conditions on bituminous coal exist in Ohio, but the situation confronting the carriers in that territory differs both in type of influences as well as in intensity."

In addition to what is said by the Commission, it should be noted that the burden of appellants' contentions with respect to the Indiana-Illinois rates is that the Commission should have accepted as conclusive of the lawfulness of the reduced rates in Ohio the fact that the rates in Illinois-Indiana referred to, were prescribed by the Commission as *maximum* reasonable rates and that therefore it became obligatory on the Commission to prescribe a similar level

of rates in Ohio, because, it is contended, operating conditions in the two regions are comparable.

It is pertinent here to refer to the Commission's supplemental report in *Coal Trade Assn. of Indiana* v. *B. & O., et al.*, 190 I. C. C. 743, 746, to show that the rates fixed therein were not prescribed as maximum reasonable rates. At p. 746 it is said (R. 1556):

> "* * * our findings for the future are primarily to more properly align these rates with the rates from competing mines rather than the fixing of maximum reasonable rates for the services rendered, * * *".

It seems scarcely necessary to point out that appellants' contention with regard to the Indiana-Illinois rates goes directly to the weight of the evidence presented to and considered by the Commission. Assuming that there is some conflict in the evidence as to the differences in operating conditions in Ohio and so-called central territory on the one hand and Illinois-Indiana territory on the other, appellees showed by a proper computation of appellants' own figures that transportation conditions in Ohio were the least favorable (R. 1654), and offered much additional evidence proving that operating conditions in Ohio were in many other respects less favorable than in Illinois, and that the general rate structure in Illinois was on a lower level than in any other part of the country; and the Commission agreed with these contentions, as shown by its report previously referred to.

With respect to the locomotive performance charts introduced by Witness Ackerman, intended to indicate the operating conditions surrounding the movement of coal in the Indiana-Illinois territory, the Commission said: (Rec. 34)

> "Theoretical or calculated tractive effort is not usually employed in fixing tonnage ratings, which are

> determined by use of dynamometer cars or actual road tests. We are not convinced that computations based on the rated tractive power of locomotives, even if correctly computed, are an accurate or reliable measure of operating conditions on different lines. Many variables are encountered in actual operation, among which may be mentioned differences in locomotives, in the character and density of traffic on the different lines, the need for expeditious transportation, and other traffic conditions which may materially reduce the weight of trains actually handled."

In view of the settled law that the courts will not weigh the evidence and substitute their judgment for that of the Commission, it seems unnecessary to dwell upon such numerous misstatements in appellants' brief (p. 12) as that Docket No. 23130 involved rates between points in central eastern Illinois; that Docket No. 23922 involved a large movement of coal and that interested parties prepared voluminous evidence in that case; or to such erroneous implications (Br. p. 13) as that the three large Ohio railroad systems handle any appreciable tonnage of coal in central eastern Illinois or from points in southwestern Indiana to the same destinations, or that the carriers' witnesses admitted (Br. p. 14) that rates in Ohio should be pulled down to the level of the Illinois-Indiana rates referred to because the latter were on a lower basis. An examination of the record will disclose that appellants' statements in these particulars are wholly unfounded. Thus, it was shown that Docket 23130 did not involve rates in central eastern Illinois but dealt primarily with rates from Illinois mines to Chicago and intermediate points, which were not fixed on any mileage scale basis, but did involve certain short haul rates of various western railroads in the western part of the State which were on the scale (R. 1562); that the volume of tonnage involved in Docket 23922 from Indiana to Illinois was negligible and unimportant (R. 1646-

1650); that no evidence in justification of the rates considered in that case was adduced by the railroads, because it was shown that the Indiana coal producers for competitive reasons must necessarily have a basis of rates comparable to that maintained within Illinois by Illinois railroads (R. 1555); that, from a tonnage standpoint, all of the railroads in the eastern district have but a very minor interest in the coal produced in Illinois and Indiana (Exhibit Vol. IV, p. 265).

As to the alleged admissions by carriers' witnesses of similarity in conditions justifying a lowering of Ohio rates to the Illinois-Indiana level, the testimony of the two witnesses which is referred to in appellants' brief plainly shows an opinion by the one that the Illinois rates are too low (R. 1548) and that *if they were* upon a normal level there *might* not be any reason why the rates in Ohio should be higher than they are in that territory. The witness expressly disclaimed any qualification to testify (R. 1537) as to operating conditions in either State but only as to traffic and tariffs, and as familiar with changes in coal rates and the traffic moving under them. The other witness, whose testimony is referred to, likewise did not essay to give operating data, but merely described the location and tonnage of mines served by his company, and concurred in the testimony of all the other traffic officers of the carriers in this case to the effect that Illinois-Indiana rates are wholly unrelated to rates on coal from mines in Ohio, Pennsylvania or West Virginia.

Second, with respect to the Wheeling cost study.

As to this, the Commission said: (Rec. 30)

> "The estimated transportation costs shown are claimed to be the results of a careful study based (a) upon representative service operations involved in the transportation of coal from this district to the several destinations during the months of January and July of

the years 1930 and 1931, (b) upon average unit costs calculated from the total freight service operating expenses of the Wheeling for the 2-year period ended December 31, 1931; and (c) upon the tabulation from the records of the Wheeling and of the Akron, Canton & Youngstown Railway of such additional data as were found necessary for a determination of the required units of service and the proper cost to be applied to such units. The evidence shows that in making the study the months of January and July were used in order that the effect upon operations of both winter and summer weather, as well as traffic conditions, might be fairly reflected in the results; and that the 2-year period ended December 31, 1931, was used in the derivation of unit cost, because it was deemed to be representative by reason of the fact that it was intermediate between the heavy traffic year of 1929 and the low traffic year of 1932.

"The coal from the mines in this district is assembled at Pine Valley, Ohio, the Wheeling's principal train terminal in the district and at three other points short distances west thereof. Through trains, handled by one locomotive each, and carrying coal for all of the several destinations, originate at Pine Valley and move through to Brewster, a distance of about 63 miles, where the trains are broken up and the cars of coal are placed in other trains for further movement to the respective destinations. Due to an adverse grade some 9.06 miles in length between Adena and Rexford, the tonnage rating of all classes of locomotives from Pine Valley to Rexford is approximately 50 per cent of the rating from Rexford to Brewster. In lieu of operating the through trains out of Pine Valley or Adena with full Rexford to Brewster tonnage rating by furnishing a helper engine to Rexford, the practice is to supplement the through trains by puller train service from Pine Valley and the other assembling points to Jewett, a point about 5 miles west of Rexford. The cars of coal moved from the assembling points to Jewett by the puller trains are

placed in the through trains at that point to fill them out to full tonnage rating to Brewster.

"The distances from Pine Valley to the respective destinations are shown in the study to be as follows: To Cleveland 138 miles, to South Lorain 137 miles, to Huron 145 miles, to Canton 76 miles, to Massillon 73 miles, and to Akron (Mogadore)* 99 miles.

"The study is predicated upon the number of service units of each kind involved in assembling the coal, and in moving it in through trains from Pine Valley to each of the respective destinations, and returning the empty cars to the coal district, to which the Wheeling's average freight service operating expense per unit for the respective units is applied. To the estimated operating expense per ton for transporting the coal, to the several destinations, amounts ranging from 1.7 to 2.3 cents per ton are added for deficit from passenger-train operation, these amounts being 2.89 per cent of the estimated transportation expense from the coal district to the respective destinations, and this percentage being the ratio of the amount of the deficit from passenger-train operation to the amount of the total freight-service operating expenses.

"Inasmuch as trains are not operated through from the coal district to the several destinations, but are broken up at Brewster, it was necessary to estimate the number of service units of each kind that would be involved for imaginary or hypothetical trains assumed to be operated through from this district to each of the six destinations. This was approximately done on the basis of data compiled from the conductors' train reports and other records of the carrier, and certain averages derived therefrom.

"Petitioning respondents criticize the cost study in various respects. They call attention to the fact that total expenses are combined with total units to de-

*Mogadore is the junction with the A., C. & Y.; from this junction the coal is moved to industries in Akron by A., C. & Y. yard engines.

velop system averages, and that these are then generally applied to specific operations which are not themselves spread over the system, and say that this is a fundamental objection to cost studies of this kind which has been frequently recognized by the Commission. They point out that maintenance expenses during 1930 and 1931 were drastically reduced, as compared with normal years, on account of the general depression, and testify that such expenses therefore can not be typical of the expenses during a normal period. In this connection they refer to the fact that the freight-train car-repair expenses in 1931 were less than one-half the amount of these expenses in 1930, while the number of serviceable car-days was somewhat greater in 1931 than in 1930. They also claim that the track-maintenance expenses per unit for the 2-year period ended December 31, 1931, used in the study, were substantially less than the corresponding expenses per unit for the five-year period 1927 to 1931, inclusive. They criticize the methods employed in deriving the system average operating expenses per service unit as being erroneous in several respects, and they claim that not all of the service units involved were taken into account in arriving at the estimated costs of transporting coal to the several destinations. They also point out that the estimated transportation costs do not include the cost of handling company material or nonrevenue traffic.

"An analysis of the cost study leaves no doubt that the transportation costs are underestimated to a substantial extent for several reasons.

"One of these is the use of the 2-year period ended December 31, 1931, instead of a more normal period, as the basis for the derivation of unit costs. In view of the drastic reductions shown to have been made in the maintenance expenses during this period, it can hardly be regarded as representative of the expenditures per unit normally required to be made for maintenance of way and maintenance of equipment.

"Another is the use of hypothetical through trains from the coal district to the several destinations, as

the basis for estimating the number of service units involved in transporting coal to these destinations, instead of the trains in which the coal was actually handled, as shown in the study. Using the trains in which the coal was actually handled, the same data as to unit costs, and following the same general methods of computation employed in the study, but computing the costs separately for the movement from the coal district to Brewster and for the movement from Brewster to each of the six destinations, and adding the two figures together in the case of each destination, it has been found that the costs shown in the study are underestimated on this account to the extent as follows:

From	To	Cost shown in study underestimated Per cent
Pine Valley	Cleveland	12.09
do	South Lorain	10.68
do	Huron	6.32
do	Canton	7.20
do	Massillon	11.04
do	Akron	11.21

"The failure to include in the estimated transportation costs all of the service units involved in returning the empty cars to the coal district, as well as the failure to include in these costs the expense of transporting company material or nonrevenue traffic, is responsible for the understatement of the costs to an unknown extent.

"In view of these things, as well as other imperfections in the study, it is certain that the estimated transportation costs do not represent an accurate and reliable measure of the probable actual costs. On this account the results of the study can not be used as the sole guide as to what the maximum reasonable rates should be for the transportation services here involved."

Notwithstanding the Commission's analysis and criticisms of the "Wheeling" cost study, as above set forth,

appellants urge (Br. p. 18) that because of an alleged "gross mathematical error" in recomputation, which has "neither been repudiated nor defended"—this Court is "warranted in assuming that the Commission's other criticisms of the Wheeling cost study are equally devoid of merit."

The first and quick answer to this contention is that the Commission was never asked, by petition or otherwise, to reconsider its report in this particular, obviously therefore appellants, except by criticism, have not attempted to "provoke" the Commission into a statement as to how that calculation was made.

As to the extent to which the Commission's criticisms were met in evidence, appellants refer to a "verified statement" submitted by stipulation after the close of the testimony (R. 1792-1818) summarized in App. C of their brief. They do not refer to a similar verified statement filed by appellees in which the defects in the Wheeling cost study were again pointed out and the criticisms of the Commission fully supported (R. 1832-41).

Again the appellants on this phase of the case ask the Court to review the evidence and substitute its judgment for that of the Commission. We submit that nothing in appellants' discussion of the Wheeling cost study (Br. p. 15-19) or in the evidence to which they point, is sufficient, in the slightest degree, to affect the soundness of the Commission's conclusion with respect to the Wheeling cost study that

> "In view of these things, as well as other imperfections in the study, it is certain that the estimated transportation costs do not represent an accurate and reliable measure of the probable actual costs. On this account the results of the study can not be used as the sole guide as to what the maximum reasonable rates

should be for the transportation services here involved." (Rec. 33.)

In a recent case decided March 7, 1934, by a three-judge court in the Southern District of New York (*Railway Express Agency, Inc.*, v. *U. S.*, In Equity No. 77-87), a cost study, previously presented to the Commission and criticized by it, was relied on to show that rates prescribed by the Commission were so low as to amount to confiscation. In declining to accept the results shown by the cost study, which was uncontradicted by other similar evidence, the learned Court said:

> "The plaintiffs insist that the evidence which they presented was undisputed, despite the fact that the Commission pointed out that there were many uncertain factors in the studies, and that in a number of material elements they were untrustworthy.
>
> "It was entirely within the competence of the Commission to reject this evidence as it has done. Whether a fact finding body believes a witness or not is its own concern.
>
> "Indeed, it seems to us that the Commission's challenge of these costs is entirely supportable. For it would be almost impossible accurately to show by such cost schedules what the actual cost of carrying a particular commodity was when that commodity was but one of thousands of different kinds of commodities carried by the railroads. Consequently, it would be almost, if not quite, impossible to establish that a rate on any individual commodity was confiscatory.
>
> "To attempt to show that the rate prescribed for the carriage of a single one of many thousand commodities is confiscatory or indeed unreasonable is inherently very much more difficult than to make such showing in respect of the rate prescribed for a homogeneous service, such as that furnished by a city traction line or by an electric public utility.

"The difficulty facing such proof has been often recognized by the Supreme Court, e. g.; *Louisville & Nashville Railroad Co.* v. *Garrett,* 231 U. S. 298, 314-315; *Northern Pacific* v. *State of North Dakota,* 216 U. S. 579, 580-581; *Interstate Commerce Commission* v. *Union Pacific Railroad Co.,* 222 U. S. 541, 549; *Atlantic Coast Line* v. *Florida,* 203 U. S. 256, 260.

"In the light of what was said of such proof in the decisions just cited, it seems to us that it certainly does not lie within our province to find fault with the criticism which the Commission made of the cost study schedules which were the principal basis of the complainants' case, or to challenge the Commission's refusal to accept them at their face value."

Third, with respect to the Eastern comparisons.

As to this, the Commission said (Rec. 28):

"Petitioning respondents contend that the former Ohio intrastate rates which they seek to have restored were fairly aligned with the level of interstate rates between representative points. To establish this contention they compare the former rates in Ohio, as indicated in Appendix A, with rates from the Pittsburgh district to Ashtabula, Ohio, 162.2 miles, $1.84; to Canton, 143.4 miles, $1.59; to Warren, Pa., 218.2 miles, $2.09; and to Youngstown, 96.4 miles, $1.34. Rates to Warren are shown from the Reynoldsville district, 84.5 miles, $1.50; from the Fairmont district, 115.7 miles, $1.70; and from the Aladdin district, 123.4 miles, $1.80.

"They contend that the foregoing list of rates and many others either prescribed or approved in this territory are on a reasonable basis and correspond with many others in the same territory. They also instance a rate of $1.90 established from the Pittsburgh district to Hydetown, Pa., 134 miles, maintaining the differential relationship under a group rate of $2.05 prescribed to the Buffalo group in *National Petroleum Asso.* v. *Baltimore & Ohio R. Co.,* 163 I. C. C. 625. This distance to Hydetown compares favorably with the haul from

Middle and Ohio No. 8 districts to Cleveland as indicated in Appendix A. The rate of $2.05 prescribed in the last named case from the Pittsburgh district applies to Warren, 210 miles, and is on a higher level than the former rates to Cleveland from the more remote Ohio groups, such as Cambridge, Hocking, and Pomeroy, where the distances are substantially greater. In *Kistler Leather Co.* v. *Pittsburgh, S. & N. R. Co.*, 169 I. C. C. 247, a rate of $1.90 was prescribed from mines in the Reynoldsville district of Pennsylvania to Olean, N. Y., although the short line distance was only 86 miles, and the average from all mines in the group 155 miles. In *Wickwire Spencer Steel Corp.* v. *Director General*, 88 I. C. C. 54, a rate of $1.75 was prescribed during Federal control from Leetonia, Ohio, to Harriet, N. Y., 251 miles. This rate subjected to the general changes in rates since that time would now be $2.20. In *Carnegie Steel Co.* v. *P. R. R. Co.*, 107 I. C. C. 676, a rate of $1.84 was prescribed from Ohio origins to Munhall, Pa., 78 miles. It is significant that the rates relied on by complainants in that case consisted of rates from Ohio mines to 46 destinations in Ohio and Pennsylvania which averaged $1.523 for an average distance of 83.3 miles. In *Hagerstown Chamber of Commerce* v. *Western M. Ry. Co.*, 147 I. C. C. 463, a rate of $2.33 per ton of 2240 pounds, the equivalent of $2.08 per ton of 2000 pounds, was prescribed from the Cumberland-Piedmont district to Hagerstown, Md., and Waynesboro, Pa., for hauls of 137 and 156 miles, and $2.46 per ton of 2240 pounds, the equivalent of $2.20 per ton of 2000 pounds, to Union Bridge, Md., 179 miles. In *Republic Iron & Steel Co.* v. *B. & O. R. R. Co.*, 83 I. C. C. 429, a rate of $1.50 from Russellton, Pa., in the Freeport district, to Youngstown, 85 miles, was found not unreasonable. These rates are also typical of the rates prescribed or approved in *Endicott-Johnson Corp.* v. *E. R. R. Co.*, 73 I. C. C. 562; *Balcron Coal Co.* v. *Bessemer & L. E. R. Co.*, 161 I. C. C. 307; *Bedford Pulp & Paper Co.* v. *Chesapeake & O. Ry. Co.*, 163 I. C. C. 670; *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, 190 I. C. C.

> 302; *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I. C. C. 325; and in *Bash & Co.* v. *B. & O. R. R. Co.*, 96 I. C. C. 178. The record is replete with comparisons of this nature to indicate that the former rates in Ohio were not higher than rates in the same general territory and that the reduced rates are on a lower basis than prevail on interstate shipments of bituminous coal from the Appalachian district."

The criticism by appellants (Br. pp. 20-21) of rate comparisons offered by appellees and the consideration given them in this case likewise asks the court to weigh the evidence and substitute its judgment for that of the Commission. Their statement (p. 20)

> "many of them [these comparisons] were drawn from districts where, as appears from its own repeated findings, transportation conditions are more severe than west of the Alleghenies"

is wholly without support in the record, either as to the territorial application of the rates themselves or as to relative transportation conditions, and it is significant that appellants cite not a single page of the record to support their assertion.

The fact is that the great bulk of the comparisons offered in evidence by appellees consists of rates applying west of the Alleghenies, although, as we shall later show, comparisons of rates applying east thereof, not without probative value, have been cited and considered by the Commission in numerous earlier cases involving coal rates in central territory. For reference to the character of the rate comparisons offered and relied on by appellees, we direct attention to Exhibit Vol. II, pp. 153-168, 180-190; Vol. IV, pp. 244-245.

Included in the catalog of comparisons are certain rates applying to points east of the Alleghenies, but they consti-

tuted relatively a very small part of the total. The weight to be given them was for the Commission. Such comparisons have frequently been cited and considered by the Commission in other important cases involving rates within central territory. See, for example, the tabulations of rates, including such comparisons, in *Bituminous Coal to C. F. A. Territory*, 46 I. C. C., at pp. 88 and 89. They apply on the lines of the identical railroads for whom this brief is filed. Moreover, there are many rates cited applying west of the Alleghenies which are on an equal level, so that the few eastern rates that were included in the comparisons were no doubt given only the consideration that the Commission thought they deserved. For example, Kern Exhibit 69 (Exhibit Vol. II, p. 155) shows several such rates. It also contains a number of rates applying west of the Alleghenies. It will be noted from the last block of rates shown on the exhibit that the rates on coal from western Pennsylvania mines, such as the Pittsburgh and Burgettstown districts, are exactly the same for identical distances to Ohio points (Columbus, Trinway and Newark, Ohio, as to Altoona, Harrisburg, Pa., etc., which lie east of the mountains. Rates on a similar level from Butler, Pa., and other western Pennsylvania points to destinations in that area are instanced in the first block of rates in the same exhibit. It will be noted that these rates are at a level substantially higher than the intrastate rates in Ohio which the Commission's order required to be restored, as will appear from the following table:

Ohio Intrastate Rates Restored by the Commission.

	From	To	Miles	Rate
(Rec. 70)	Ohio No. 8	Cleveland	128	$1.74
"	Cambridge District	"	176	1.74
"	Crooksville District	"	171	1.76
(Rec. 71)	Hocking District	"	199	1.89
"	Pomeroy District	"	252	1.89

Interstate Level of Rates.

(Exhibit Vol. II,	From	To	Miles	Rate
p. 155)	Butler District	Franklin, Pa.....	94	$1.86
"	Pittsburgh District	Ashtabula, O.....	142	1.84
"	Indiana (Pa.) District	Titusville, Pa....	159	2.03
"	Pittsburgh District	Canton, O.....	126	1.59
(p. 156)	Fairmont District	Corry, Pa.....	109	1.90
"	Reynoldsville District	Clarendon, Pa....	76	1.50
(p. 180)	Kentucky No. 4 Distri	Dayton, O.....	231	2.14
(p. 186)	Hocking, O. District	Butler, Ind.....	268	2.20
(Exhibit Vol. IV, p. 244)	Ohio No. 8 District	Dunkirk, N. Y...	245	2.24

The foregoing are typical of the numerous comparisons cited by appellees. Many of the others listed in their exhibits reflected a much higher level. For example, one of the eastern rates, was $2.33 for 137 miles from the Cumberland-Piedmont district to Hagerstown, Md., fixed by the Commission in *Hagerstown Chamber of Commerce* v. *W. M. Ry. Co.*, 147 I. C. C. 463. The same exhibit (Exhibit Vol. II, p. 157) shows a rate west of the Alleghenies on a level even higher, namely, $1.90 for 86 miles from the Reynoldsville district to Olean, N. Y., which was also fixed by the Commission after investigation. *Kistler Leather Co.* v. *P. S. & N. R. Co.*, 169 I. C. C. 247.

The *Republic Case* cited by appellants (Br. p. 19) was *not* the Republic Case decided by the Interstate Commerce Commission (83 I. C. C. 429), but one of the Ohio Commission cases which required the reductions involved herein and which was in part responsible for the undue discrimination which the Interstate Commission required to be removed. In the *Interstate Republic Case*, the Commission had approved a rate of $1.50 for a distance of 85 miles from Russellton, Pa., to Youngstown, Ohio, which likewise involved a movement entirely west of the Alleghenies. It will be noted in this connection that the bulk of the comparative

rates exhibited and relied upon by these appellees were prescribed or approved by the Commission. The rates fixed in the cases cited by appellants, for application in the East, are relatively higher than the intrastate rates the Commission here required to be restored. From what has been stated and from the several other decisions cited by the Commission in its report herein, it plainly appears that instead of using as yardsticks the highest rates to be found in this record, as is contended by appellants, it actually fixed the Ohio rates in relation to the lowest comparative rates.

Perhaps the oft-repeated pronouncement of the Court that it will not weigh the evidence nor substitute its judgment for that of the Commission renders unnecessary the foregoing description of the state of the record, but in view of the flagrant misstatements in appellants' brief, as to the character of the evidence and the failure of the Commission to adopt proper criteria in determining the lawfulness of the Ohio rates, it has been thought best to summarize the carriers' evidence in this regard.

Concluding the discussion of point I of appellants' brief, it appears that having first charged the Commission with an unlawful purpose, and having asked this Court, in order to support the charge, to weigh the evidence considered by the Commission in the three aspects previously set forth, appellants' counsel go still further and say, "the Commission, driven by the necessity of supporting its predetermination to raise the Ohio rates, and conscious of the weakness of the evidence upon which it had to act, devised a presumption against the legality of the Ohio rates of an unparalleled severity." Here follow five pages of argument directed against an alleged imaginary presumption, which the Commission never, in any sense, devised or suggested. The whole argument is based upon a complete and deliberate misconception of what the Commission said. We

refer to the summary of the report set out at page 22 of appellants' brief, which reads as follows:

> "Under such circumstances and in view of the closely woven relationships of these rates under which the industry in this territory has been fostered, and particularly the present economic condition which also has affected the railroads adversely, only the most convincing evidence would warrant the disruption of the long existing relationship of rates or the reduction of the interstate rates. That convincing proof does not appear on the present record."

We submit that there is not a single word in the above quotation which can be reasonably construed as being intended to "devise" a presumption against the legality of the reduced Ohio rates. The plain and simple meaning of the language used by the Commission is that, having reached the conclusion that the interstate rate level was reasonable and that the long-existing differential rate relationship considered by the Commission in such careful detail was reasonable, and that industry in the particular territory had been fostered under the closely woven relationship of these reasonable interstate rates, in order to disrupt this relationship or to justify the reduction of the reasonable interstate rates would require the most "convincing evidence." Failing such evidence, it was the necessary duty of the Commission to require the reduced Ohio intrastate rates to be raised and the old relationship restored. To say that this action or that this language involved, in any sense of the word, the *devising* of a presumption against the legality of the Ohio rates, is to strain the credulity of the Court.

Up to this time our attention has been particularly directed to appellants' Point I (Br. p. 9).

As previously stated, we see no real difference in objections urged by appellants in Points I and II, except in form of statement. The essence of the objection is that the Commission, arbitrarily ignored the evidence which appellants relied on, and made its findings of undue preference and prejudice without sufficient evidence to support them.

The law is well settled that courts may not, under the guise of exerting judicial power, usurp purely administrative functions by setting aside a lawful order upon their conception as to whether the administrative power has been wisely exercised. Power to make the order and not the mere expediency or wisdom of having made it is the question. *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Chicago & Alton R. R. Co.*, 215 U. S. 479; *Baltimore and Ohio R. R. Co.* v. *United States*, 215 U. S. 481: *Interstate Commerce Commission* v. *C., R. I. & P. Ry. Co.*, 218 U. S. 88; *Interstate Commerce Commission* v. *U. P. R. R.*, 222 U. S. 541, 547; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; *Assigned Car Cases*, 274 U. S. 564, 580. In the latter case, at pages 580 and 581, the Court said:

> "It is not for courts to weigh the evidence introduced before the Commission, *Western Paper Makers' Chemical Co.* v. *United States*, 271 U. S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 471; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States* v. *New River Co.*, 265 U. S. 533, 542. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R. R. Co.* v. *Interstate Commerce Commission*, 206 U. S. 441, 454."

In *Manufacturers Railway Company* v. *United States*, 246 U. S. 457, the Court discussed the law and at page 482, said:

> "The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission's order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this cannot be done. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320; *Pennsylvania Co.* v. *United States*, 236 U. S. 351, 361."

The latest expression of this Court, and perhaps its most concise summary of the power and duty of the Court in connection with the evidence in a Thirteenth Section case is to be found in *Florida et al.* v. *United States*, decided April 2, 1934, as follows:

> "*The evidence before the Commission.* The question of the weight of the evidence was for the Commission and not for the court. The authority conferred upon the Commission by Section 13(4) of the Interstate Commerce Act, with respect to intrastate rates, is not different in its quality or effect from that given to the Commission to prevent other sorts of unjust discrimination against interstate commerce. That authority rests upon the constitutional power of the Congress, extending to interstate carriers as instruments of interstate commerce, to require that these agencies shall not be used in such manner as to cripple, retard, or destroy that commerce, and to provide for the execution of that power through a subordinate body. *The Shreveport Case*, 234 U. S. 342, 351, 354, 355; *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co., supra.* The

purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce. *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320. That purpose unquestionably extended to the prohibited discrimination produced by intrastate rates. In relation to such a discrimination, as in other matters, when the Commission exercises its authority upon due hearing, as prescribed, and without error in the application of rules of law, its findings of fact supported by substantial evidence are not subject to review. It is not the province of the courts to substitute their judgment for that of the Commission." (Citing cases.)

All of the law in this respect was evidently in the mind of the learned Judge who wrote the opinion herein in the court below where he summarized the law as follows (R. 468):

"In a case of this sort we are, of course, concerned only with the sufficiency of the evidence to support the fact finding of the Commission and the sufficiency of the facts found to support the conclusion of the order entered. While the Commission must act upon evidence and not arbitrarily, and must properly apply the law, the courts are not concerned with 'the soundness of the reasoning by which its conclusions are reached, or whether the findings are consistent with those made by it in other cases.' Nor are we concerned with the 'wisdom' of the regulation which is prescribed. These are matters left by Congress exclusively to the administrative branch of the Government. Among the great number of decisions to this effect, see:" (Citing cases.)

It is clear from the foregoing authorities that the administrative act of fixing a maximum reasonable rate, if

supported by substantial evidence is not subject to judicial review, and the rule is the same as to minimum reasonable rates. Thus, in *United States* v. *I. C. R. R. Co.*, 263 U. S. 515, this Court said (p. 525):

> "* * * the newly conferred power to grant relief against rates *unreasonably low* may afford protection against injurious rate-policies of a competitor, which were theretofore uncontrollable." (Italics ours.)

It necessarily follows that the nature of the question of minimum reasonableness is the same as that of maximum reasonableness and the character of evidence necessary to sustain a finding likewise the same. That view was announced, after careful consideration, by the District Court (a three-judge court) for the Northern District of Ohio in *Jefferson Island Salt Mining Co.* v. *United States*, 6 Fed. (2d) 315, where the court said (p. 319):

> "It does not seem to us that the Commission has adopted any erroneous theory in determining what is a minimum rate. We agree with the Commission that *no different tests or standards are prescribed for the determination of a just and reasonable minimum rate* than for a just and reasonable maximum rate, and that the minimum rate-making power would be ineffectual, if Congress intended that it should be used only in cases where the rate assailed had been proved with mathematical exactness to be less than the cost of service. Such a test is impracticable of application to specific rates on a single commodity." (Italics ours.)

In the *per curiam* opinion of the lower court herein it was stated (R. pp. 471-472):

> "Lastly, it is urged, but with less vigor, that the intrastate carriers are justified in lowering intrastate rates for competitive reasons, and that only by the lowering of such rates could the Ohio carrier increase its tonnage, in competition with interstate carriers

for this identical type of freight elsewhere produced. Compare, *Texas & Pac. Ry. Co.* v. *United States*, 289 U. S. 627, 636. The avoidance of such destructive competition, and the establishment of a general policy regarding the national transportation system as a whole, rather than as a number of separate units, were referred to in the case of *United States* v. *Louisiana*, *supra*, decided November 6, 1933, as among the purposes of Congress in passing the Transportation Act of 1920. This, we think, is as it should be. Very broad powers have been given the Commission, under Section 15-a of the Interstate Commerce Act, to fix rates so that the carriers 'as a whole' may earn 'an aggregate annual net railway income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property.' It has been said to be impossible 'to escape the dovetail relation' between Sections 13(4) and 15-a (*Wisconsin R. R. Commission* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563, 586; *Florida* v. *United States*, *supra*, at 211), and we are inclined to the opinion that competition alone is insufficient justification for the disruption of the entire rate structure which has been set up by the Interstate Commerce Commission with all the various elements introduced by the Transportation Act in view. But whether this position be sound or not, we are quite firmly convinced that competition cannot be urged as a justification for the practice of one of the worst evils which the Interstate Commerce Act and its amendment of 1920, the Transportation Act, were designed to end—the undue preference and prejudice of discrimination."

It would be an unnecessary trespass upon the time of this Court to answer separately each and every misleading statement set forth in appellants' brief and none of which finds support in the record. We call attention to the reference to the *Empire Steel Case* at page 37 of their brief as typical. The paragraph referred to is not only misleading

but is entirely inaccurate. The Cambridge-Mansfield rate was fixed by agreement between the Ohio Commission and the carriers following the decision in *Ohio-Michigan Coal Cases,* 80 I. C. C. 663, which included a Section 13 proceeding (Docket 12851) against Ohio intrastate rates, and in which the Commission said (p. 690):

> "The differentials between southern Ohio and the Crescents prescribed in this report on interstate traffic will go far to remove the undue prejudice and preference, and unjust discrimination against interstate commerce, which we find to exist in the relation of interstate and intrastate rates from Ohio, and it may be that respondents upon application to the Ohio commission will be authorized to complete the removal and restore the rate parity formerly existing. No order will be entered at this time in No. 12851."

No order was later entered by the Interstate Commerce Commission because rates agreed upon were established in tariffs carrying a notation prepared by counsel for the Ohio Commission (Rec. 574-576) (See pp. 211-212; 278-282, Exh. 129-A, omitted in printing by stipulation). The rate to Mansfield was in issue (Par. IV, petition before I. C. C., Rec. p. 1851) (Rec. 1871-2). It was definitely related to other rates in the general adjustment. The purpose and effect of the order of the Ohio Commission was not "to remedy a local situation," but was entirely arbitrary and knowingly a departure from the agreed adjustment. The Interstate Commission did not act in disregard of the evidence but on the contrary in complete consonance with it.

The statement in appellants' brief referred to is typical and is entirely without support. Indeed, appellants are unable to conjure one single finding of the Commission which is not amply supported by facts of record. The facts may be controversial but the evidence is there and this Court will not pass upon the credibility of witnesses or substitute

its judgment for that of the Commission upon disputed questions of fact.

The mere fact that plaintiffs did not prevail before the Commission is therefore no ground for invalidating the Commission's order. Stripped of all superfluous argument the real contention of plaintiffs herein will be seen to be that the Commission cannot require what the State authorities say are maximum reasonable intrastate rates to be raised to correspond to the interstate level, regardless of facts adduced or findings based thereon. The law is now apparently well settled to the effect that such a question is not and cannot be the controlling issue: i. e., the reasonableness *per se* of the intrastate rates, in a proceeding brought to annul an order issued under Section 13 of the Act. We confidently insist that the sole issue in such a proceeding is the relation of rates to each other or the relation of rates to income, and yet appellants herein seek an annulment of the Commission's order on the ground that the intrastate rates, if maximum reasonable rates, cannot be disturbed; and cite the *Georgia Case*, 283 U. S. 765, in support thereof. The same contention, while somewhat differently phrased, was directly made in the *Georgia Case, supra,* and expressly rejected by this Court. In the *Georgia Case,* and in reliance upon the Interstate Commerce Commission's decision in *State Corporation Commission of Virginia* vs. *Aberdeen & Rockfish R. R. Co.*, 136 I. C. C. 173, it was contended that where the issue was between intrastate and interstate rates it was necessary in the first instance to determine whether or not the difficulty was caused by the intrastate or the interstate rates. In that case the Commission said (p. 180), "Plainly we cannot require intrastate rates to be raised above a maximum reasonable level in order to cure a disparity with interstate rates," and then went on to say, with respect to Paragraph 4, Section 13, and the intrastate rates alleged to cause undue prejudice or unjust

discrimination, that obviously an order could not be made "without consideration of the reasonableness of the rates in issue."

The Georgia case was reopened for further consideration and the issue limited so as to exclude evidence as to the reasonableness of the rates, both interstate and intrastate, 160 I. C. C. 309. The order of the Commission reopening the case was limited to the question of whether the rates required by the Georgia Public Service Commission caused undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce, on the other, or whether such rates caused any undue, unreasonable or unjust discrimination against interstate or foreign commerce.

This limitation on the hearing and the refusal to receive evidence as to the reasonableness of the interstate and intrastate rates was attacked on the ground that the order of the Commission was entered without the full hearing provided by Section 13(4). The contention was made that the order was invalid, not only because it excluded evidence as to the reasonableness of the interstate rates, which the petitioning carriers in that case sought to have applied upon intrastate traffic in Georgia, but also as to the reasonableness of the intrastate rates. In disposing of this contention this Court speaking through Mr. Justice Brandeis said: (p. 770)

> "It is true that when state rates are assailed on the ground that they result in undue prejudice to interstate shippers or discriminate against interstate commerce, the Commission must determine whether the existing interstate rates are reasonable, as it may not require intrastate rates to be raised above a reasonable level. *State Corporation Comm.* vs. *Aberdeem & Rockfish R. Co.*, 136 I. C. C. 173, 180. But the reasonableness of the interstate rates had already been found when they were

established in the earlier stage of the proceedings; * * * The appellants' objection to the procedure is unfounded."

It should be remembered that this contention, so vigorously urged in the *Georgia Case* and so strongly relied upon by appellants here, was made after this Court had said in the *Florida Case* (282 U. S. 194, 214) that:

> "In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other."

As stated by this Court in the *Georgia Case* in the quotation just above, the question of the level of rates, that is the reasonableness of the rates, is concluded when the Commission has determined whether the existing interstate rates are reasonable. Having determined this fact, as had been done in the *Georgia Case* and as has been done here by the finding of the Commission with respect to the interstate rates, the question of the reasonableness of the level of the reduced intrastate Ohio rates becomes wholly immaterial and irrelevant.

In concluding our discussion of Point II in appellants' brief reference is made to the argument therein (Br. p. 35), that such considerations as competitive conditions; that heavy investments in mining properties outside the State of Ohio were seriously affected by the Ohio reductions; that coal moved freely between Ohio points prior to the reductions; and that in removing undue prejudice against interstate coal producers the rates should be determined with regard to the value of the service to the shipper; that distance has never been the sole measure of these rates; and that the interstate movement of coal to these northeastern Ohio destinations ceased or was checked by reason of the

Ohio reductions, were the sole criteria invoked by the Commission in finding undue preference and prejudice and therefore the Commission exceeded its powers. It is insisted by appellants that the only standards which the Commission may lawfully consider are transportation standards and that the Act prohibits any other.

It could, of course, be readily shown by reference to numerous decisions of this court that the various items of evidence referred to by appellants are matters which the Commission may properly consider in passing upon the lawfulness of rates. See *Texas & Pac. Ry. Co.* v. *I. C. C.*, 162 U. S. 197, 218, 219, 220, 233; *Ann Arbor R. Co.* v. *U. S.*, 281 U. S. 658, 666; *I. C. C.* v. *L. & N. R. Co.*, 73 Fed. 409, 419; *I. C. C.* v. *C. G. W. Ry.*, 141 Fed. 1003, 1014, affirmed in *I. C. C.* v. *C. G. W. Ry.*, 209 U. S. 108.)

Such a demonstration seems wholly unnecessary, however, in view of appellants' admission (Br. p. 31) that undue preference and prejudice can be predicated "upon a disparity in rates that is not warranted by differences in service." That is precisely what the Commission found based on ample evidence in the record. The language of the Commission's decision is as follows: (R. 63):

> "It further appears that the movement of such coal from the Ohio points or groups and to the Ohio territory outlined in Appendix D is at *intrastate rates* which are *generally substantially lower*, distance considered, *than* are *the reasonable interstate rates*, herein approved, under which such coal is moved to the same destinations from Pennsylvania and West Virginia; that this *disparity* in rates is greater than is warranted by the differences in transportation conditions from the Ohio mines, on the one hand, and the Pennsylvania and West Virginia mines, on the other * * *" (Italics ours.)

The foregoing quotation from the Commission's report is a complete answer to the argument of appellants that the Commission's decision rests on nothing more than the consideration of "the commercial welfare of the interstate producers and the carriers."

III.

The order of the Commission is a valid exercise of the authority conferred by Section 13, paragraphs (3) and (4) of the Interstate Commerce Act, because it requires the removal of unjust discrimination against interstate commerce.

The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove an unjust discrimination against interstate commerce is not open to dispute. *Railroad Commission of Wisconsin* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *Arkansas Railroad Commission* v. *C., R. I. & P. Ry. Co.*, 274 U. S. 597; *Alabama* v. *United States*, 279 U. S. 229; *Florida* v. *United States*, 282 U. S. 194; *Georgia Public Service Commission* v. *United States*, 283 U. S. 765; *Alabama* v. *United States*, 283 U. S. 776; *Louisiana Public Service Commission* v. *Texas & New Orleans R. R. Co.*, 284 U. S. 125; *United States* v. *Louisiana*, 290 U. S. 70; *Florida* v. *United States*, No. 342, decided April 2, 1934.

All questions concerning the Commission's power and the constitutionality thereof to issue an order solely for the purpose of removing unjust discrimination against interstate commerce were settled by the Court's holding in the *Wisconsin Case*, supra, in which the order, though not sustained in its state-wide scope because of discrimination against persons or places alone, was sustained in its entirety as one necessary to remove unjust discrimination against interstate commerce growing out of revenue losses.

As expressed by Chief Justice Taft in that case, p. 587, the words of Section 13 (4) "unjust discrimination against interstate commerce" are not tautological of the preceding words prohibiting undue preference or prejudice as between persons or localities but "aptly include a kind of discrimination against interstate commerce which the operation of the new act for the first time makes important and which would seriously obstruct its chief purpose," namely, unjust discrimination against interstate commerce because of an undue burden upon the revenues of the carriers.

The Court, on pages 589 and 590, said:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. *Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate* commerce system in doing state work." (Italics ours.)

Predicated upon findings of revenue losses resulting from a substantial disparity between state and interstate rates, which disparity operates as a real discrimination against and obstruction to interstate commerce, and requiring increases in those rates in order to remove an undue burden upon the revenues of interstate carriers, the order in question is clearly one of the character authorized by Section 13 (4).

Appellees insist that the findings of the Commission are sufficient upon both kinds of discrimination, *i. e.*, as against

persons or localities and as against interstate commerce. As to the latter, even admitting, *arguendo,* that the Commission's finding as to discrimination against interstate commerce is deficient in some slight regard, we can not find any force in Part IV of appellants' brief for the reason that resting alone upon the finding of discrimination against persons and localities, the Commission's findings are entirely sufficient to support its order even had revenue discrimination against interstate commerce not been found by the Commission.

But the Commission's findings were not deficient as to revenue discrimination in any particular. There are no formal requirements for findings to be made by the Commission in this type of case.

Appellants rely upon the first decision in *Florida* v. *U. S.,* 282 U. S. 194, as supporting their contention that the Commission's order is not a valid exercise of the power to remove revenue discrimination against interstate commerce because there was no finding of the "essential facts" with respect to the effect of the intrastate rates upon the income of the carriers. The contention is thus stated:

> "This means that there must be evidence and findings as to the effect of the intrastate rates, both existing and prescribed, on the carriers' *intrastate* revenues." (Br., p. 61.)

Upon the retrial in this Court of the *Florida Case,* decided April 2, 1934, the same criticisms were made of the Commission's findings upon reconsideration with respect to revenue burden as had been previously made. As to this, the court said:

> "On the new hearing, the Commission made comprehensive findings to supply what had thus been found to be lacking. The findings set forth at length transportation conditions, traffic and revenues * * * Appellent's criticisms proceed upon an unwarranted assumption."

This necessarily means that the appellants' assumption of the degree of exactness with respect to present or future revenue effect that must be found by the Commission was unwarranted, and that their construction of the rule laid down in the first *Florida Case* was erroneous.

This is shown by the following statement of the court in its last opinion:

> "The requirement of *essential findings* as to revenues did not demand an impracticable exactness. Losses through inadequate rates could be shown satisfactorily even though proof of the precise extent of such losses was not available. Reasonable determinations were required and these were made." (Italics ours.)

Appellants here have fallen into the same error. They argue as if the rule of the first *Florida Case* had not been modified and made more consonant with the practicalities of proof in matters which, in the essence, involve prophecy and judgment.

They overlook the emphasis which the Court, in the second case, laid upon the findings in the supplemental report, as to "transportation conditions, traffic and revenues" and the necessary support they give to the Commission's conclusion as to the revenue burden that would follow the continuance of the reduced intrastate rates. They also overlook the fact that this Court, in the second case, only refers to "losses through inadequate rates" and does not refer to proof of possible increases in revenue from increased intrastate rates.

Our construction of the decision in the second *Florida Case* is wholly supported by what is said in *U. S.* v. *Louisiana*, 290 U. S. 70, 80:

> "The objection that the finding of unjust discrimination by the intrastate rates against interstate com-

> merce is unsupported by any finding that the increased rates would produce increased revenue is rested upon the statement, separated from its context in the Commission's report, 'we conclude that no positive finding in regard to the revenue outcome of the increases can be justified.' It is manifest that any finding of undue prejudice to interstate commerce, based upon the failure of prevailing intrastate rates to contribute their fair share to the support of a national transportation system, must necessarily rest upon a prediction that an increase of the intrastate rates will result in an increase of revenue, a prediction involving, especially since 1930, many elements of uncertainty. There are no formal requirements for the findings to be made by the Commission in this type of case, see *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 490, and while the particular form in which they were cast here is not to be commended, the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data, including estimates of experienced railroad traffic men, to which the report refers, that the probability of increased revenue was sufficiently great to make the increase of rates a reasonable exercise of sound managerial judgment. This, we think, meets the requirements of the statute."

So the appellants here, as was attempted in the Louisiana case, seek to separate from its context in the Commission's report, that portion which deals especially with the effect of the reduced rates upon appellees' intrastate revenues, and they quote only a part of that statement.

They erroneously insist that "revenue effect" must be exclusively prognosticated and adjudicated on the results to be expected from intrastate rates without regard to the burden upon commerce moving on interstate rates. They erroneously say (Br. p. 69) that "the test of revenue discrimination is whether the state rates if increased, would produce more state revenue."

Loss in revenue, whether interstate or intrastate, is the measure of the burden caused by state action, and it is in the light of the whole result and the probability as to whether the state action will burden interstate commerce in the future that the question must be determined.

It is the Commission's responsibility upon the whole record to say whether the reduced intrastate rates contribute their fair share to the support of a national transportation system, and its report must be read as a whole to determine whether, in the exercise of its informed judgment, the probability of increased revenue to be expected from a restoration of the *status quo* was sufficient to justify the order to the extent that it finds an unjust discrimination against interstate commerce.

It is in the light of these principles that the Commission's report must be read as a whole, its discussion of the effect of the reduced rates on the appellees' revenues considered, and the validity of its conclusion as to revenue burden supported or denied.

To this end we invite the Court's attention to what is said as to the effect of the reduced rates on the appellees' revenues (R. 59):

> "Effect of Reduced Rates on Carriers' Revenues.
>
> "Operating revenue and expense data are set forth to demonstrate the need of carriers in the eastern district for additional revenue and the further shrinkage of revenues that would result if interstate rates on coal are reduced to the level of the Ohio intrastate rates. Operating revenues in the eastern district reached their peak in 1926, when all class I carriers, including the Pocahontas lines, earned 5.52 percent on their book investment, plus net additions and betterments. If the Pocahontas lines are excluded from the computations the earnings were 5.16 percent. There

was a steady decline in the rate of return in 1927 and 1928, a slight improvement in 1929, and a very marked decline each year thereafter. The earnings for 1931 were 2.24 percent if the Pocahontas lines are included, 1.89 percent if they are excluded. The Pocahontas lines, as a group, earned 8.55 percent in 1929, 6.80 percent in 1930, and 5.36 percent in 1931.

"The operating ratio was lowest in 1929 when, for all carriers in the eastern district, 20.3 percent of the total operating revenues were available for fixed charges, dividends, and surplus. If the Pocahontas lines are excluded from the list of carriers, 19 percent of the total operating revenues were available for these purposes. For the first nine months of 1932 this percentage had dropped to 12 and 9.9 percent, respectively. The lines in the eastern district as a whole earned their fixed charges 2.52 times in 1929, and only 1.26 times in 1931. For the first nine months of 1932, there was a deficit of $25,720,000 under fixed charges. Forty-three out of a total of 68 class I roads in the eastern district operated at a loss for this period.

"The aggregate deficit of the 43 lines was $68,443,416 and the aggregate deficit of 8 roads affected by the reduced rates on coal was $29,598,000, or approximately 42 percent of the total. Only one line, the Pennsylvania, among those affected by the reduced rates on coal had a surplus after payment of fixed charges, and this surplus was only slightly greater than the revenue accruing to it under the emergency charges recently authorized for a temporary period. The deficit of the Baltimore and Ohio for the first nine months of 1932 was $5,837,202. The reduced intrastate rates based on its intrastate coal tonnage to the principal consuming points in Ohio, in 1931, would result in a reduction of $226,000 in the revenues of this line.

"The principal coal-carrying roads have estimated the reduction in revenues that would result if the interstate rates from mines in Pennsylvania, Virginia, and West Virginia to Cleveland, Lorain, Akron, Can-

ton, Massillon, Alliance, and other important consuming points in northeastern Ohio are reduced by the same amounts as applied to the intrastate rates. The reduction on the Pennsylvania would be $948,447 if based on 1929 tonnage, and $516,400 if based on 1931 tonnage. The estimated reduction in revenue for other lines based on 1931 tonnage is as follows; New York Central, $202,666; Pittsburgh & Lake Erie, including tonnage received by it from the Monongahela, the Montour, the Pittsburgh, Chartiers & Youhiogheny, and the Pittsburgh & West Virginia in Pennsylvania, $331,375; and Baltimore and Ohio, $215,000. The Norfolk & Western estimates a reduction in revenue of about $500,000 based on its 1929 tonnage.

"If a corresponding reduction were made in the interstate rates to all destinations in central territory, it would result in a loss of revenue based on 1931 tonnage of $3,434,745 for the Pennsylvania, $1,271,291 for the New York Central, and $1,938,044 for the Pittsburgh & Lake Erie. Coal tonnage constituted 55.3 percent of the total freight tonnage of the latter line in 1931. The effect that a reduction in interstate rates on coal to Ohio will have on the revenues of other lines is not shown in specific amounts but there is a substantial volume of coal destined to Ohio which is originated on or carried by the Pocahontas lines and by such lines as the Montour, and Monongahela, and the Pittsburgh & West Virginia, which derive the greater portion of their revenue from coal traffic. Far greater losses would result if the reductions were reflected to related territories and this greater estimated loss on account of maintaining existing relationship of rates has been discussed in the early part of this report."

Thereafter in the Commission's report (R. 61-63), follows a summary which in the nature of things refers back to and is supported by the evidence and findings previously set forth and then, among others, the following ultimate finding is made (R. 64):

> "We further find that from the points or groups and to the territory outlined in appendix D to this report the assailed Ohio intrastate rates result and will result in undue, unreasonable, and unjust discrimination against interstate commerce, in violation of section 13 of the act."

We submit that all of this is sufficient under the second *Florida Case, supra,* and the *Louisiana Case, supra,* to fully support the Commission's order requiring the removal of unjust discrimination against interstate commerce.

IV.

The order of the Commission is valid because it is based upon findings of fact amply supported by evidence of record.

We come now to a discussion of Point III in appellants' brief. For twenty pages it is argued by them that the Commission exceeded its authority in requiring the Ohio state rates to be raised "without having first found or made reasonable all substantially competitive rates to the same destinations" (Br., p. 40).

Because the Commission did not, in specific terms, measure singly all involved rates mile for mile with others or find with a nice but impossible precision that the actual cost of transportation between each of the involved points was so much in dollars and cents, appellants assert the order must fall. But to require specific evidence and separate adjudication of each rate would be tantamount to denying the possibility of granting relief. It is not necessary that the Commission consider singly each rate in a comprehensive adjustment. In the *Georgia Case, supra,* this Court said (p. 774):

> "While the order relates only to a few commodities, the scales of rates are statewide in operation; and they

apply to shipments between hundreds of points of origin and destination. To require specific evidence and separate adjudication in respect to each would be tantamount to denying the possibility of granting relief."

However, under point III of appellants' brief it is stated (Br. p. 43):

"In the light of these facts we say the Commission exceeded its authority in requiring Ohio rates to be raised to the level of a *selected portion only* of the competitive interstate rates."

But the selective recital of facts preceeding the statement just quoted is wholly immaterial to the point appellants seek to establish by them.

The Commission said (R. 23-24):

"The Pittsburgh district rate to Youngstown, Ohio, was considered in *Youngstown Sheet & Tube Co.* v. *P. & L. E. R. R. Co.*, 29 I. C. C. 428, where the then existing rate of 70 cents was found not unreasonable. Before and since that finding the Ohio No. 8 rate to Youngstown has been the same as the rate from the Pittsburgh district to that destination. The Pittsburgh-Youngstown rate has sometimes been termed the 'key rate' in the adjustment to northeastern Ohio, on which the Pittsburgh district rates to this territory have been built. *Bituminous Coal to C. F. A. Territory*, 46 I. C. C. 66, 73. The Pittsburgh district rate to Cleveland at the time the last-named case was decided was $1, which formed the basis for the then existing rate of $1 from the southern Ohio districts to Toledo, Ohio. Later, we established a rate of $1.89 from southern Ohio to Toledo and, to maintain the existing parity, the same rate was made to apply to Cleveland. Upon these rates the entire relative adjustment in this territory has developed. Rates from the Pittsburgh dis-

trict to northeastern Ohio have for years been made a fixed differential over Ohio No. 8, Connellsville a fixed differential over Pittsburgh, and Fairmont a fixed differential over Connellsville. And from the southern West Virginia and Kentucky fields rates have been constructed differentially over eastern or southern Ohio."

Again (R. 29):

> "The record is replete with comparisons of this nature to indicate that the former rates in Ohio were not higher than rates in the same general territory and that the reduced rates are on a lower basis than prevail on interstate shipments of bituminous coal from the Appalachian district."

Thus the entire adjustment was considered and the Commission then said (R. 62):

> "Any change in the rates from these origin groups would disturb the adjustment involved in this proceeding. While the rates only to northeastern Ohio are assailed, yet any finding as to that territory would reflect itself immediately to the territory beyond, possibly altering the adjustment as far as Chicago."

It will be noted by the description of the adjustment above (R. 23-24) that it is based upon the Pittsburgh-Youngstown rate as a "key rate," with the Pittsburgh district rate to Cleveland, and that the entire relative adjustment has been built thereon. When rates of wide application are fixed, separate adjudication in respect to each rate and point is not essential. *Georgia Case, supra.* Nor is it essential in approving an extended relative adjustment that separate adjudication in respect of each specific point or rate be made. If with the entire adjustment in mind the basis is found reasonable, and the relationship undisturbed,

the finding is *ipso facto* one of reasonableness of the level and relativity of the whole. And this finding is sufficient. *Manufacturers Railway Co.* v. *United States, supra.* The entire adjustment was before the Commission by virtue of the numerous individual complaints consolidated herein for hearing (R. 43, 44, 50, 55, 57) and the Commission had all of the complaints in mind in making its findings (R. 65).

Appellants say (Br. p. 48):

> "In the case at bar the Commission found the interstate rates reasonable without evidence to support the finding, because it considered only the *highest* part of an interstate rate system which was made on the basis of the *average* reasonableness of the whole interstate adjustment and not on the basis of the *individual* reasonableness of each rate."

and as we understand the somewhat labored argument following it is their position that in prescribing rates, those for comparable mileages, and the fundamental rate-making principle that ton-mile earnings should decrease as distance increases, must both be disregarded for the sake of their argument. Appellants base their objection upon the fact that the rate, for instance, from Ohio No. 8 to Cleveland for an average distance of 128.2 miles was not made to reflect ton mile revenue upon the basis of all rates from all groups, and from which the average rate would, of course, reflect a much longer haul than the one from Ohio No. 8 to Cleveland. Such a contention is a most radical departure from all well established principles of rate making for, followed to its logical conclusion, it could only result in "postage-stamp" rates (one constant rate per ton from all origins to all destinations) or in other words the abandonment of group boundaries and the constituting of the entire Appalachian field as one enormous origin group.

Should appellants say that their argument quoted above is misconstrued, and that it is not based upon ton-mile criteria or distance considerations, their statement then automatically becomes inaccurate, for upon every other medium of measurement the rates which they complain the Commission used are in fact *not the highest but the lowest* in the entire adjustment (except their own Ohio rates) for they are applicable for the shortest distances and consequently less in cents per ton. Thus their entire argument under point III, viewed from either of the only two possible angles, is untenable as being wholly unsound as to the first and falsely premised as to the second.

In concluding the discussion of this point, we submit that the opinion of the learned court below completely disposes of appellants' contention.

On this point the court said (R. 470):

> "The Commission also found that the interstate rates from the Pittsburgh, Freeport, Connellsville and Fairmont districts to destinations in northeastern Ohio were reasonable. It is contended that the order is void because the Commission did not also examine into and make findings upon all other rates from the Inner and Outer Crescents to northeastern Ohio. This contention is likewise without merit. It is enough if discrimination in respect of the Pittsburgh, Freeport, Connellsville and Fairmont districts, and the coal operators of these districts, be found. There was no obligation upon the Commission to find specifically that each individual rate was reasonable, or that rates from all localities into northeastern Ohio were reasonable. *Cf. United States* v. *Louisiana, supra* (decided Nov. 6, 1933). If it be contended that any rate from some other locality is unreasonable, and it is desired in good faith to test this question, the one so contending is afforded a remedy by application to the Interstate Commerce Commission."

Conclusion.

For the reasons herein stated, we respectfully submit that the decrees below should be affirmed.

Respectfully submitted,

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